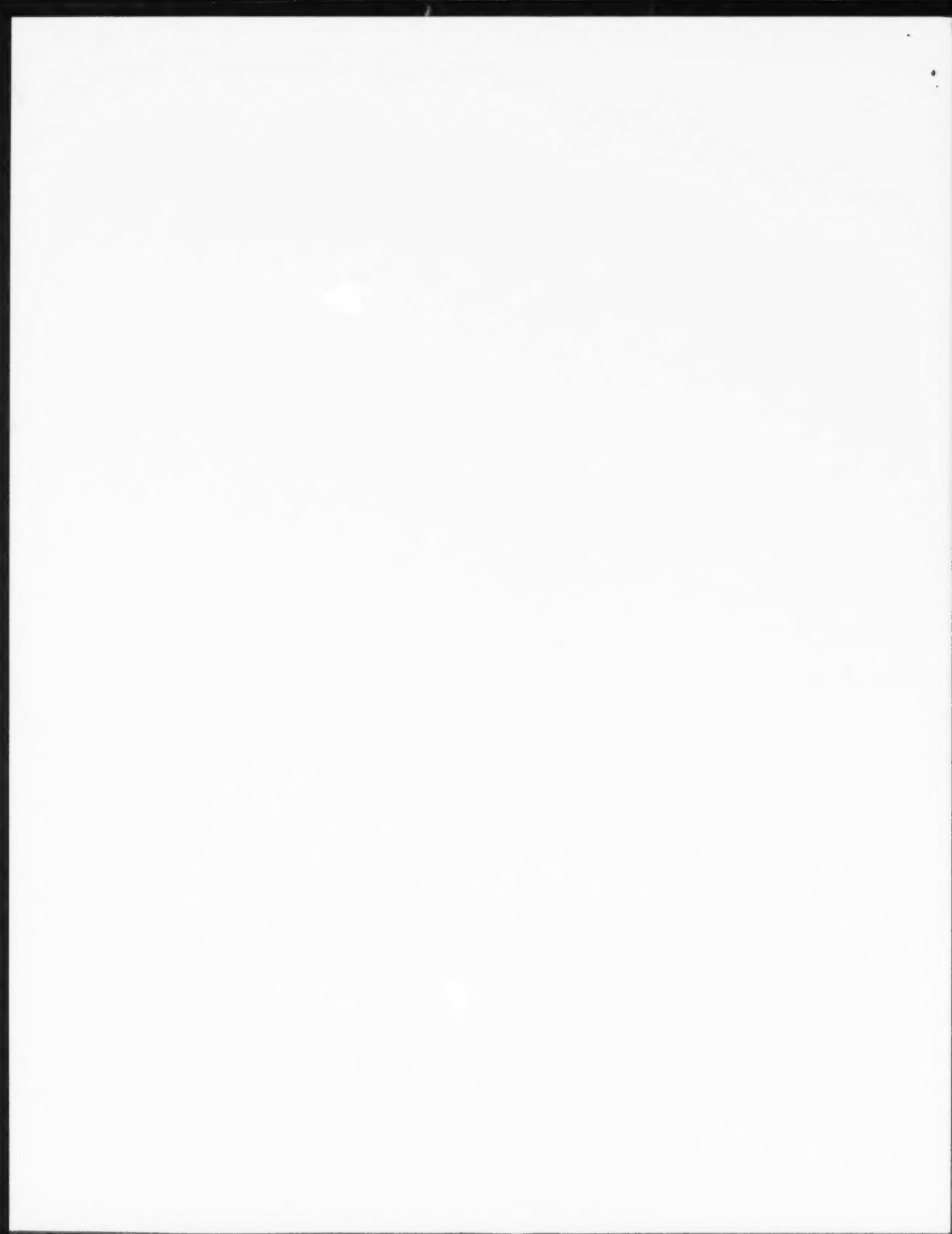


**Information
and Privacy
Commissioner/
Ontario**

ORDER MO-2225



**Ann Cavoukian, Ph.D.
Commissioner
September 2007**





BACKGROUND

On July 6, 2007, the Office of the Information and Privacy Commissioner/Ontario (IPC) received correspondence from an individual (the complainant) raising concerns regarding the information collection practices of the Ottawa Police Service (the Police). Specifically, the complainant expressed the view that the Police's collection of information relating to individuals who had sold items to second-hand goods shops was in contravention of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). As the complainant's correspondence also made reference to a by-law of the City of Ottawa (the City), this office opened privacy complaint files with respect to both the Police (MC07-46) and the City (MC07-47).

CONDUCT OF THE INVESTIGATION

Introduction

After opening the investigation files, the IPC contacted the complainant and the two institutions involved in order to obtain more information on the collection practices under the City's by-law.

After obtaining general information on the complaint, the IPC sent a notice to both the Police and the City setting out the IPC's understanding of the facts and issues raised by the complaint. The notice requested that both institutions provide their respective positions on whether the collection practices under the by-law were in accordance with the applicable provisions of the *Act*.

The notice also asked the parties to comment on the applicability of a recent decision of the Court of Appeal for Ontario in *Cash Converters Canada Inc. v. Oshawa (City)*, (2007) O.J. No. 2613 (*Cash Converters*). In that case, the court declared that a City of Oshawa second-hand goods shops by-law was of no effect, because collection of personal information under the by-law breached section 28(2) of the *Act*.

The City and the Police made submissions in response to the notice.

After reviewing these submissions, I sent a supplementary notice to the Police and the City, both of which provided further submissions in response.

Licensing of Second-Hand Goods Shops and Pawnshops

The City licenses second-hand goods shops under the City's Harmonized Licensing By-Law 2002-189 (the By-Law), specifically Schedule 14. Schedule 14 applies to all premises "where second-hand goods are stored, displayed or offered for sale by retail" including shops involved in "taking in exchange" or "receiving in pledge" (By-Law, section 1; Schedule 14, section 1).

There are roughly 120 second-hand goods shops licensed by the City. Among these are a number of businesses (about 20) that are considered to be "pawnshops," which are also sometimes called

pawnbrokers. Pawnbrokers in Ontario are subject to the *Pawnbrokers Act*. The remaining 100 stores are second-hand goods shops that may purchase and sell second-hand goods but do not provide all of the services traditionally associated with pawnshops.

A pawnshop is a particular form of second-hand goods shop, where the operator provides a loan to individuals (called "pawners" under the *Pawnbrokers Act*) in exchange for receiving an item of value (called a "pledge" under the *Pawnbrokers Act*). The pawnshop holds onto pledges for a set period of time, and if, at the expiry of this time period, the pawner has not repaid the loan, the pawnbroker will become the owner of the good and will be able to sell it to any member of the public.

The *Pawnbrokers Act* contains a number of provisions directed at regulating the business practices of pawnbrokers. However, the Police state that they do not actively enforce the provisions of the *Pawnbrokers Act*:

Pawnshops (are) regulated under the second hand goods by-law. Some of the requirements of the *Pawnbrokers Act*, if enforced, would result in it being impossible for a pawnshop to operate in today's realities.

Below I will describe what information is gathered, and how it is processed, under Schedule 14 of the By-Law.

Information Second-Hand Goods Shops Obtain from Sellers

Schedule 14 requires second-hand goods shops to ensure that the individual selling an item (the seller) presents two pieces of identification, including at least one of the following, provided that it is integrated with a photograph of the seller:

- a. a valid driver's licence
- b. a passport issued by the government of origin
- c. a B.Y.I.D. (Bring Your Identification) Card issued by the Liquor Control Board of Ontario
- d. a Certificate of Indian Status issued by the Government of Canada
- e. a Certificate of Canadian Citizenship issued by the Government of Canada,
or
- f. a Conditions Release Card issued by Correctional Services of Canada.

(Schedule 14, sections 11-12.)

Further, Schedule 14 requires second-hand goods shops to obtain detailed information relating to the seller and the transaction, as follows:

- a. the day, month, year and time of the transaction
- b. the full name, date of birth, address and approximate height and weight of each seller
- c. the full particulars of both pieces of the seller's identification (described above)
- d. a detailed description of each second-hand good that shall be reasonably sufficient to identify it, including make, model, serial numbers, marking and titles, where applicable
- e. the purchase price of each second-hand good or a description of the item exchanged for it, and
- f. the initials of the employee conducting the transaction on behalf of the licensee.

(Schedule 14, sections 11-13.)

Second-hand goods shops must record this information in a "transaction record" either manually in a ledger book or in a "recording system approved by" the Police (section 13).

Information the Police Obtain from Second-Hand Goods Shops

Once the second-hand goods shops receive and record information under Schedule 14, the shops must produce transaction records, upon request, to the Police. The Police may inspect, copy or remove the records (Schedule 14, section 16).

Although not explicitly contemplated or required by Schedule 14, the Police state that second-hand goods shops have the option of routinely transmitting transaction records directly to the Police. According to the Police, this transmission of data is preferable to having the Police conduct on-site inspections of the records of second-hand shops. In this regard, the Police state:

Transmittal of the records is on a voluntary basis. In doing that, the presumed purpose would be to inspect records at our office, rather than at the store because of the lack of efficiency in doing that. Therefore, to the extent stores have co-operated, they would deliver records rather than having us photocopy them.

The Police state that where shops transmit records to the Police, they may be sent in either paper or electronic form. Where records are provided in paper form, they are maintained in filing cabinets in the custody of the Police. Where second-hand goods shops choose to record the information electronically, they must do so using a system developed by Business Watch International (BWI), a company based in Regina, Saskatchewan.

The Police use the services of BWI to facilitate the electronic transmission of transaction data from second-hand goods shops to the Police, and have entered into a Memorandum of Agreement with BWI and the shops that sets out the terms of their business relationship.

Once transactions are entered into computers located in second-hand stores, the data is automatically transmitted electronically to BWI, which retains the personally identifiable transaction data on behalf of the Police. The Police have stated that, within BWI, access to the transaction information is limited to authorized individuals.

According to the Police, the identifiable transaction information maintained by BWI can be accessed and searched by any police officer with the use of a password. In addition to accessibility by the Ottawa Police, the Police have stated that the records contained in the BWI system are not only available to its own police officers, but are also readily available to many other police services across Canada.

The Police have noted that since the inception of a pilot project with BWI in 2000, there have been a total of 266,381 transaction records received from second-hand goods stores in Ottawa involving 44,128 identifiable sellers.

Of the approximately 20 pawnshops in the City, nine routinely provide electronic reports to the Police using the BWI system, while the remaining shops provide routine paper reports to the Police.

Of the remaining 100 second-hand goods shops that are not pawnshops, three submit information to the Police using the BWI software; the Police, to a certain extent, monitor nine additional shops. The remaining second-hand goods shops appear not to be involved in the purchase of second hand goods exclusively or on a regular basis, and therefore do not provide routine reports and are not regularly monitored by the Police.

ISSUES ARISING FROM THE INVESTIGATION

I identified the following issues, which will be discussed in turn, as arising from this investigation:

- (A) Is the information being collected under Schedule 14 of the By-Law "personal information" as defined under section 2(1) of the *Act*?
- (B) Is the collection of personal information by the shops on behalf of the City under Schedule 14 of the By-Law in compliance with section 28(2) of the *Act*?
- (C) Is the collection of personal information by or on behalf of the Police under Schedule 14 of the By-Law in compliance with section 28(2) of the *Act*?
- (D) Do the City and/or the Police comply with the indirect collection requirements in section 29(1) of the *Act*?
- (E) Do the City and/or the Police comply with the notice of collection requirements in section 29(2) of the *Act*?

RESULTS OF THE INVESTIGATION

Issue A: Is the information being collected under Schedule 14 of the By-Law "personal information" as defined under section 2(1) of the Act?

The term "personal information" is defined in section 2(1) of the *Act*, in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual . . .

The information at issue in this investigation is the transaction information that second-hand goods shops obtain from sellers under Schedule 14 of the By-Law. This includes the following information that clearly, on its face, is about personally identifiable individuals who are selling their used goods:

- name
- date of birth
- approximate height
- approximate weight

In addition, the six different forms of photographic identification would potentially reveal a wide variety of personal information, which may include information such as race, national origin, age, sex and marital status (paragraph (a)), criminal history (paragraph (b)), identifying numbers (such as driver's licence or passport number) (paragraph (c)), or residential address (paragraph (d)).

Further, information about the transaction, such as its date and time, the description of the good, and the purchase price, when linked with the identity of the seller, qualifies as personal

information about the seller, since it is information relating to a financial transaction in which the individual has been involved (paragraph (b)).

I agree with the City and the Police that the information being collected under Schedule 14 of the By-Law qualifies as "personal information" under the *Act*. This conclusion is consistent with the decision in *Cash Converters*, which dealt with similar types of information.

Issue B: Is the collection of personal information by the shops on behalf of the City under Schedule 14 of the By-Law in compliance with section 28(2) of the Act?

Introduction

Section 28(2) of the *Act* states:

No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

This provision generally prohibits the collection of personal information on behalf of an institution, but states that there are three circumstances where such a collection may take place. In order for an institution to justify a particular collection of personal information, it must show that the collection fits within at least one of the three section 28(2) exceptions.

In its submissions, the City acknowledges that the portions of Schedule 14 of the By-Law that require the shops to collect personally identifying information from individual sellers are not in compliance with section 28(2) of the *Act*, based on the *Cash Converters* decision.

Under the system created by Schedule 14 of the By-Law, the personal information is communicated in two main stages. In the first stage, the second-hand goods shops obtain the information from individual sellers. The City submits that it does not collect personal information under the By-Law; rather, it states that information is collected by the shops and then "made available to police should the police request the information for a policing purpose."

I do not accept the City's submission that it does not collect personal information under Schedule 14 of the By-Law. When the shops obtain this information under Schedule 14, they are collecting it on behalf of the City. The reason why the shops obtain the information is to fulfil the City's purposes in enacting Schedule 14 (I will elaborate on these purposes below). In addition, the City has an unqualified power to inspect the transaction records under section 8(1) of the By-Law. Accordingly, I find that the first collection is conducted by the shops on behalf of the City. This conclusion is consistent with the findings in *Cash Converters*, in which the court considered the municipality to have collected information under a very similar scheme (see *Cash Converters*, paragraphs 46-48, 52-53).

The second collection takes place when the shops transmit the information either directly to the Police, or to BWI on behalf of the Police. Here, the Police are collecting the personal information.

I will initially deal with the first collection by the shops on behalf of the City. The City must justify the second-hand shops' collection of personal information on behalf of the City, under section 28(2) of the *Act*. I will deal with the second collection under Issue (C) below.

In addition, based on the statements by the Police that they do not actively enforce some provisions of the *Pawnbrokers Act*, and that they consider *all* of the second-hand goods shops to be regulated under the By-Law (including pawnshops), I find that the collection of personal information in this case takes place under Schedule 14 of the By-Law, and not the *Pawnbrokers Act*.

Exception 1: "Expressly Authorized by Statute"

Section 28(2) permits the collection of personal information where the collection is "expressly authorized by statute."

In *Cash Converters*, the court cited with approval my office's approach to this exception:

36. The phrase "expressly authorized by statute" has been interpreted by the Commissioner to mean that the specific types of personal information collected be expressly described either in a statute or in a regulation that has been authorized by a general reference to the activity in a statute. See Investigation I95-030P, *A College of Applied Arts and Technology*, (1995) O.I.P.C. No. 546; Investigation I96-057M, *A Board of Education*, (1996) O.I.P.C. No. 449 at paras. 17-18.

In *Cash Converters*, the court ruled that a by-law made under the *Municipal Act, 2001*, requiring the collection of personal information, is *not* sufficient for the purpose of the first exception:

37. . . . The structure of the (*Municipal Act, 2001*) indicates that it was not the intention of the legislature to allow municipalities, simply by virtue of their power to enact by-laws, to determine the type of personal information that can be collected.

I agree with and adopt the court's view that the by-law making authority in the *Municipal Act, 2001* is insufficient to satisfy the first exception in section 28(2) of the *Act*.

The City has not directed me to any other relevant statutory provision. Therefore, I find that the collection of personal information by the second-hand goods shops on behalf of the City under Schedule 14 is not expressly authorized by statute, as required under section 28(2) of the *Act*.

Exception 2: “Used for the Purposes of Law Enforcement”

In *Cash Converters*, the court stated the following with respect to the purpose of the by-law in question in that case:

5. The by-law was enacted under s. 150(1) of the *Municipal Act, 2001* . . . , which provides that a municipality may license, regulate and govern any business wholly or partly carried on within the municipality. Section 150(2) of the (*Municipal Act, 2001*) provides that a municipality may only exercise its licensing powers for one or more of three purposes, namely health and safety, nuisance control and consumer protection.

Later in its judgment, the court made the following findings with respect to the “law enforcement” exception:

38. Section 28(2) also allows personal information to be collected on behalf of an institution if the information is “used for the purposes of law enforcement.” Of significant concern in this case is the wholesale transmission to the police of a significant amount of personal information about individuals. *This transmission occurs before there is any basis to suspect that the goods that were sold to the second-hand dealer were stolen and is made with no limit as to its use by the police or by those to whom the police may share the information.* Although some of the information collected may ultimately be used for law enforcement, the purpose of the by-law and its intent in obliging vendors of second-hand goods to disclose so much personal information and transmitting all of it to the police is for consumer protection and not law enforcement (emphasis added).

I find this reasoning applicable here. As in *Cash Converters*, Schedule 14 was enacted pursuant to sections 150(1) and (2) of the *Municipal Act, 2001*, and therefore this part of the By-Law can only have one or more of the three listed purposes, namely health and safety, nuisance control and consumer protection. Based on the evidence before me, I find that the purpose of Schedule 14 is consumer protection, for essentially the same reasons as those in *Cash Converters*. In addition, the City does not take the position that the By-Law was passed for law enforcement purposes. Although some of the information collected may ultimately be used for law enforcement, the purpose of Schedule 14 and its intent in requiring the shops to collect the personal information is for consumer protection and not law enforcement.

Although the *Municipal Act, 2001* was amended significantly in 2006, Schedule 14 was enacted prior to those amendments. In any case, although section 150(2) has been repealed, the current version of the statute indicates that a by-law such as Schedule 14 could be passed only for similar purposes (see sections 10(2)5 (economic, social and environmental well-being of the municipality), 6 (health, safety and well-being of persons), 8 (protection of persons and property, including consumer protection), and 11 (business licensing)). Again, criminal law enforcement is not a listed purpose for which a municipality may pass a by-law.

The Police submit that personal information is collected under Schedule 14 pursuant to its general law enforcement mandate under the *Police Services Act*. The Police specifically cite section 4(2), which states that police services must include “crime prevention” and “law enforcement.” Under this part of the analysis, the question is whether the collection of information by the shops on behalf of the City is justified under section 28(2) of the *Act*. Since the City itself has no mandate under the *Police Services Act*, that statute does not apply to bring this collection within the second exception under section 28(2).

Exception 3: “Necessary to the Proper Administration of a Lawfully Authorized Activity”

In order to decide whether this exception applies, I must first determine what the “activity” is, and whether it is “lawfully authorized.”

The activity in question is the City’s licensing of second-hand goods shops. The City is authorized to license these businesses under section 150(1) of the *Municipal Act, 2001*. The City may only exercise its licensing powers for one or more of the following purposes:

- health and safety
- nuisance control
- consumer protection

The City states that it enacted the By-Law for the purposes of health and safety and consumer protection.

The court in *Cash Converters* found that the purpose of the second-hand goods licensing by-law in that case was to protect consumers by deterring unscrupulous vendors from attempting to sell stolen goods (see paragraphs 23, 46).

Consistent with the court’s finding in *Cash Converters*, I find that the lawfully authorized activity in question is the City’s licensing of second-hand goods shops for the purpose of consumer protection. Although the City refers to a second purpose, health and safety, it has not supported this assertion, and I find that it does not apply.

The next question is whether the City’s collection of personal information under Schedule 14 of the By-Law is “necessary to the proper administration” of the lawfully authorized activity.

The court in *Cash Converters* approved of my office’s approach to the interpretation and application of the third exception in section 28(2) of the *Act*:

40. (T)he jurisprudence developed by the . . . Commissioner interpreting this provision is both helpful and persuasive of the proper approach to be taken by the courts as well. In cases decided by the Commissioner’s office, it has required that in order to meet the necessity condition, the institution must show that each item or class of personal information that is to be collected is necessary to properly

administer the lawfully authorized activity. Consequently, where the personal information would merely be helpful to the activity, it is not “necessary” within the meaning of the *Act*. Similarly, where the purpose can be accomplished another way, the institution is obliged to choose the other route.

Therefore, I must determine whether, in this case, the collection of personal information by the shops on behalf of the City is not merely helpful, but is “necessary for an effective consumer protection regime to license second-hand dealers.” Further, it must be shown that it is necessary to collect “each item, or class of personal information.”

In *Cash Converters*, the court was not persuaded by the city’s evidence that its collection of personal information was “necessary to the proper administration of a lawfully authorized activity.” The court stated:

47. In her affidavit filed on behalf of the city, the Deputy City Clerk deposes that in a 2003 report for the city by its commissioner of corporate services, the commissioner identified two issues, manual record-keeping and the burden on the police, as reasons to consider electronic-computerized procedures to improve the enforcement of the by-law then in existence.

48. The Deputy City Clerk states that the collection of identity information from vendors of second-hand goods is aimed at suppressing crime and is intended to discourage unscrupulous people from transacting business with second-hand dealers. If such people know that the records are being collected in a timely and effective fashion, they are less likely to be unscrupulous.

49. The effect of this evidence is that the new provisions are intended to improve the old system by modernizing the recording of the information using computers and by making the system easier for the police to administer because they receive the information electronically on a daily basis without travelling to the second-hand stores. However, it is clear that there is no attempt to say that the new provisions are necessary for administering the licensing system or for its effectiveness. In contrast, in the *Toronto Taxi Alliance v. City of Toronto*, (2005) O.J. No. 5460 (C.A.) the city had two task force reports that discussed the problem with taxi licenses and how the new by-law would address the problem.

50. The appellants point out that there is no evidence to suggest that there is a growing problem in the municipality regarding the sale of stolen goods to second-hand dealers. On the contrary, there were only 30 suspected stolen items with a total value of \$1,200, out of the 28,000 items dealt with by the Oshawa franchisee in 2003. Nor is there evidence that unscrupulous persons are more deterred by the electronic collection and transmission of personal information than by manual collection and transmission to the police.

51. The effect of the new by-law is to facilitate the collection and electronic recording of detailed, identifying information about persons, mostly innocent but some unscrupulous, including their photograph and details of three pieces of identification as well as the time of their visit to the store and the nature of the goods offered for sale. *This information is then transmitted and stored in a police database and available for use and transmission by the police without any restriction and without any judicial oversight.* The intent of (the Act) is to ensure that the collection and retention of private information is strictly controlled and justified.

52. Based on the evidence in this application, the city has not demonstrated that the impugned provisions of the new by-law that mandate the collection and electronic transmission to police of detailed personal information about vendors of second-hand goods, is necessary for an effective consumer protection regime to license second-hand dealers . . . (emphasis added).

In my view, similar considerations apply in this case. The City states that it has “no information regarding the significance and magnitude of criminality occurring in, or being facilitated by, second-hand goods shops,” but adds that the Police “may have information on this subject.”

The City then submits that one of the reasons why it passed the predecessor to the By-Law was to address the “increase of second-hand goods shops and sale of stolen property through these establishments, as reported by” the Police. The City points to a 1998 report from its Department of Urban Planning and Public Works to City Council which states that the Police reported “an increase in the movement of stolen goods through second-hand goods shops.” Further, the City states that it relied on the 1998 report in re-enacting the By-Law in 2005. The City provides no additional information on this point.

I find that the submissions of the City fail to establish that the collection of personal information in this case is necessary for an effective consumer protection regime. The City concedes that it has no information regarding the magnitude of the problem. Also, the 1998 report contains only a generalized assertion by the Police of what they perceive to be a growing problem.

The Police have attempted to demonstrate the necessity of the collection of personal information by providing submissions to our office, including a copy of a report entitled “Fencing in Pawnshops and Second Hand Goods Businesses.” In this report, the Police acknowledge that they do not have statistical evidence to prove the extent to which these shops are used by criminals to sell stolen goods, or to prove the existence of any deterrent effect of their routine collection of personal information. Instead, they only provide anecdotal data.

In addition, the Police present a limited amount of statistical data based on a study of seven Ottawa pawnshops. According to this data, over a two year period, the Police made a total of 113 seizures of stolen property from the seven pawnshops. This amounts to an average of approximately 57 seizures per year in Ottawa. The Police state that the replacement value of the items seized was approximately \$334,000.

The Police do not provide statistics on how the number of seizures or the dollar value of the items compared to the overall number and dollar value of the transactions at these shops. Further, the Police do not indicate the basis on which these seven shops were chosen, or the extent to which this sample of shops is representative of all second-hand goods shops in Ottawa. This sample of seven pawnshops is unlikely to be representative of the total group of second-hand goods shops (currently about 120), the vast majority of which are not pawnshops.

The anecdotal data is of little use in determining the magnitude of the problem in Ottawa. The Police provide approximately 80 examples from across the country, 14 of which arose in Ottawa. The Ottawa examples do not include a time frame to provide context for the anecdotes, nor do the Police quantify how these 14 anecdotes compare to the overall extent of transactions taking place in second-hand goods shops. As a result, based on this information, it is not possible for me to assess the significance of the problem in general, or the direction of any trends within the City of Ottawa.

Aside from the fact that the City and Police have not provided compelling evidence with respect to the magnitude of the problem, the institutions have also failed to demonstrate why it is *necessary* to collect personally identifiable information (as opposed to a description of the goods) in order to protect consumers.

As this office has stated, and the Court of Appeal reiterated in *Cash Converters* (see paragraph 40) where the purpose can be accomplished another way, the institution is obliged to choose the other route. In this case, as an alternative, stolen property can be identified where transaction records containing only descriptions of goods are compared with descriptions of items that have been reported as stolen. Some of the anecdotal examples demonstrate that stolen property can be identified and recovered without the use of the personal information of sellers, for example, where Police are able to match serial numbers.

While it may be possible that the collection of personal information is “helpful” to the consumer protection purpose of the By-Law, the evidence falls short of establishing that the collection of any single element of personally identifiable information is “necessary” to the proper administration of that activity.

I am not satisfied, based on the evidence before me, that it is necessary for the second-hand goods shops, on behalf of the City, to collect this wide range of personal information with respect to individual sellers. The evidence of the City and the Police does not persuade me that it is necessary to collect this personal information in order for the City to administer an effective licensing system to protect consumers.

As stated above, any information relating to a second-hand goods transaction that is not linked to an identifiable individual does not qualify as personal information under section 2(1) of the *Act*. Accordingly, the *Act* does not prohibit the collection of that information alone, (for example, information relating to the goods sold).

I conclude that the shops’ collection of personal information on behalf of the City does not meet the third exception under section 28(2) of the *Act*.

Conclusion

The collection of personal information by second-hand goods shops on behalf of the City under Schedule 14 of the By-Law is not in compliance with section 28(2) of the *Act*. Accordingly, the collection practices of the City under sections 11, 12 and 13 of Schedule 14 of the By-Law conflict with section 28(2).

This conclusion does not affect the right of second-hand goods shops to choose to collect and retain bare contact information about sellers, or contractual information (such as a description of the goods) where the shops have a legitimate business need to do so, or where there is a valid legal authority to do so (outside the scope of the By-Law).

Issue C: Is the collection of personal information by or on behalf of the Police under Schedule 14 of the By-Law in compliance with section 28(2) of the *Act*?

As explained above, under Schedule 14, the Police directly collect personal information from second hand goods shops, either on their own or through BWI.

The Police state:

The nature of a law enforcement institution is to record information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require assistance and intervention by the Police.

.

By the police having access to this information we are able to determine if individuals are selling items, that have been reported stolen to the police, to these second-hand goods stores. This would allow us to identify criminals in a timely manner, make arrests and prosecute any offenders. Therefore, we feel that this information is being collected for a law enforcement purpose.

Having found that the collection of personal information under Schedule 14 by second-hand goods shops on behalf of the City contravenes section 28(2) of the *Act*, the subsequent routine collection of that information by or on behalf of the Police cannot be considered permissible or justifiable under the *Act*. By definition, the personal information was obtained contrary to law and, therefore, any subsequent collection, use or disclosure of this information must be seen as violating both the letter and the spirit of the *Act*. This is the very reason why the Legislature has granted my office the power under section 46(b)(ii) "to destroy collections of personal information that contravene" the *Act*. As then Attorney General Ian Scott stated to the standing committee reviewing the bill that lead to the enactment of the *Freedom of Information and Protection of Privacy Act*:

So there are three standards and, unless you can meet one of those, any collection of personal information is unlawful . . . One of the critical features of this act is that it says, unless you meet one of these three tests, it is unlawful even to collect it.

(Debates of the Standing Committee of the Legislative Assembly on the Freedom of Information and Protection of Privacy Act for Monday March 23, 1987).

For this reason, I find that the collection of personal information by or on behalf of the Police under Schedule 14 of the By-Law is not in compliance with section 28(2) of the *Act*.

Further, the collection practice of the Police under Schedule 14 of the By-Law does not fit within any of the three exceptions under section 28(2).

The Police rely on all three exceptions under section 28(2).

Exception 1: "Expressly Authorized by Statute"

The Police state:

Transaction records from second-hand goods transactions are collected under the authority of the (By-Law) while pawn transactions are collected under the authority of the *Pawnbrokers Act* . . .

I agree with the court's view in *Cash Converters* that collections of personal information under the *Pawnbrokers Act* would be sufficient for the purposes of the first exception in section 28(2) for the specific types of information required or permitted to be collected under that statute (see *Pawnbrokers Act*, section 9(1)).

However, as I found above, the collection of information in question is taking place pursuant to Schedule 14, and not the *Pawnbrokers Act*, even in the case of the second-hand goods shops that are pawnshops. Therefore, the first exception does not apply.

Exception 2: "Used for the Purposes of Law Enforcement"

In *Cash Converters* the court stated:

38 . . . Although some of the information collected may ultimately be used for law enforcement, the purpose of the by-law and its intent in obliging vendors of second-hand goods to disclose so much personal information and transmitting all of it to the police is for consumer protection and not law enforcement

In this case, similar considerations apply. The purpose of the By-Law and its intent in the routine transmission of personal information to the Police is for consumer protection and not law enforcement.

This conclusion does not, however, limit the ability of the Police, outside the scope of Schedule 14 of the By-Law, to gather personal information during the course of a specific investigation or otherwise within the scope of their law enforcement powers, for example, as found under the *Police Services Act*.

Exception 3: "Necessary to the Proper Administration of a Lawfully Authorized Activity"

As I found above, the lawfully authorized activity in question is the City's licensing of second-hand goods shops for the purpose of consumer protection under the By-Law. I also found above that the evidence of the City and the Police did not persuade me that it is necessary for the City to collect the wide range of personal information in question in order for the City to administer an effective licensing system to protect consumers.

To the extent that the Police collect personal information under the Schedule 14 scheme, this collection also is not necessary to achieve the consumer protection purpose of the By-Law, for the same reasons as above.

Conclusion

I find that the collection of personal information by the Police or, of even greater concern, by BWI on behalf of the Police, under Schedule 14 of the By-Law, contravenes section 28(2) of the *Act*. Accordingly, the collection practices of the Police under sections 13 and 16 of Schedule 14 of the By-Law conflict with section 28(2).

Issue D: Do the City and/or the Police comply with the indirect collection requirements in section 29(1) of the Act?

Section 29(1) states that an institution must collect personal information only directly from the individual to whom the information relates, unless one or more of eight listed exceptions applies.

As I found above, when the shops obtain personal information from the sellers, they are doing so on behalf of the City. This information is collected directly from sellers. However, the Police collect personal information from the shops, and not directly from the sellers.

Because I have found above that the collections of personal information do not comply with section 28(2), it is not necessary for me to consider whether they have complied with section 29(1) of the *Act*.

Issue E: Do the City and/or the Police comply with the notice of collection requirements in section 29(2) of the Act?

In addition to my findings under section 28(2), the City and the Police do not comply with the notice of collection requirements of section 29(2). That section reads:

If personal information is collected on behalf of an institution, the head shall inform the individual to whom the information relates of,

- (a) the legal authority for the collection;

- (b) the principal purpose or purposes for which the personal information is intended to be used; and
- (c) the title, business address and business telephone number of an officer or employee of the institution who can answer the individual's questions about the collection.

The City states that it is not aware of any specific notice of collection being provided to individual sellers. The Police provide no submissions on this point. Accordingly, I am not satisfied that either the City or the Police provide individual sellers with the requisite notice as described in section 29(2). Accordingly, the City and the Police are in contravention of this additional requirement with respect to the collection of personal information under Schedule 14 of the By-Law.

SUMMARY OF FINDINGS

I have made the following findings in this investigation:

1. The information being collected under Schedule 14 of the By-Law qualifies as "personal information" under section 2(1) of the *Act*.
2. The collection of personal information by the second-hand goods shops on behalf of the City under sections 11, 12 and 13 of Schedule 14 of the By-Law contravenes section 28(2) of the *Act*.
3. The collection of personal information by or on behalf of the Police under sections 13 and 16 of Schedule 14 of the By-Law contravenes section 28(2) of the *Act*.
4. The collection of personal information by or on behalf of the City and the Police under sections 11, 12, 13 and 16 of Schedule 14 of the By-Law contravenes the notice requirements under section 29(2) of the *Act*.

ORDER

In *Cash Converters*, having found that certain provisions of the by-law conflicted with section 28(2) of the *Act*, the court made the following declaration:

I would declare the challenged sections of Schedule A to the by-law: ss. 10(c), (d), 15, 20, 22(a), and (b) to be "of no effect" under s. 14 of the *Municipal Act, 2001*.

The court made this declaration pursuant to its inherent remedial powers, and also pursuant to specific statutory powers under the *Courts of Justice Act* (sections 96, 97) and the *Municipal Act, 2001* (sections 14, 273).

Unlike the court, I have no statutory power to grant a declaration. My remedial powers with respect to collection of personal information are set out in section 46(b) of the *Act*, which reads:

The Commissioner may,

after hearing the head, order an institution to,

- (i) cease a collection practice that contravenes this Act, and
- (ii) destroy collections of personal information that contravene this Act;

Based on these powers, and my findings set out above, I order as follows:

Cease Collection

1. I order the City to take the necessary legal and administrative steps to ensure that the second-hand goods shops licensed under the By-Law cease collecting personal information under sections 11, 12 and 13 of Schedule 14 of the By-Law. At a minimum, this includes the City repealing or amending the By-Law, and the City notifying the shops that they must cease collecting the personal information.
2. Order Provision 1 does not affect the right of second-hand goods shops to choose to collect and retain bare contact information about sellers (name, address, telephone number, email address), or contractual information (such as a description of the goods) where the shops have a legitimate business need or valid legal authority (outside the scope of the By-Law) to do so.
3. I order the City to take the necessary legal and administrative steps to ensure that the Police, and BWI on behalf of the Police, cease collecting personal information under sections 13 and 16 of Schedule 14 of the By-Law. At a minimum, this includes the City repealing or amending the By-Law, and the City notifying the Police and BWI that they must cease collecting all personal information.
4. I order the Police to take the necessary legal and administrative steps to ensure that the Police, and BWI on behalf of the Police, cease collecting personal information under sections 13 and 16 of Schedule 14 of the By-Law. At a minimum, this includes the Police notifying BWI that they must cease collecting all personal information on behalf of the Police.

Destruction

5. I order the City to take the necessary legal and administrative steps to ensure that the second-hand goods shops licensed under the By-Law destroy all personal information collected under sections 11, 12 and 13 of Schedule 14 of the By-Law.
6. Order Provision 5 does not apply to bare contact information (name, address, telephone number, email address), or to contractual information (such as a description of the goods), for which the second-hand goods shops have a legitimate business need, or valid legal authority (outside the scope of the By-Law) to collect and retain. To be clear, any information that does not meet this description must be destroyed, such as information contained in copies of identification documents, which clearly exceeds bare contact information.
7. I order the Police to take the necessary legal and administrative steps to ensure that the Police, and BWI on behalf of the Police, destroy all personal information collected under sections 13 and 16 of Schedule 14 of the By-Law.
8. In order to verify compliance with this Order, I require that the City provide me with proof of compliance by the City and the second-hand goods shops, or an update on compliance activities, by February 28, 2008.
9. In order to verify compliance with this Order, I require that the Police provide me with proof of compliance by the Police and BWI, or an update on compliance activities, by February 28, 2008.

COMMISSIONER'S MESSAGE

This order marks the first time that this office has issued a cease collection and destruction order under the *Act* or its provincial counterpart. I have decided to issue this order because of the compelling privacy issues at stake in this case, as well as the clear direction provided by the Court of Appeal for Ontario in *Cash Converters*.

In their representations, the Police indicate that BWI maintains a large electronic database on its behalf containing the records of more than a quarter of a million used goods transactions involving 44,128 personally identifiable individuals. In addition to being accessible by both the Ottawa Police and BWI, these records are accessible to other police services across Canada that have entered into agreements with BWI, and could potentially be made accessible to police services outside of Canada.

In my view, the creation and continued maintenance of this database constitutes a grave infringement to the privacy rights of individuals. The Police are not required to obtain a warrant, or demonstrate any suspicion of wrongdoing, in order to access the database, while every individual who sells an item to a second-hand goods store may become subject to scrutiny

by the Police, even though it is clear that the vast majority are innocent, law-abiding citizens who have committed no offence.

Identification is the first step that leads you down the road to surveillance. Once personally identifying information about an individual is collected and retained centrally in a database, the ability to use that information for additional purposes is unlimited. Compounding the injustice is that fact that such a database is accessible to law enforcement agencies across the country, without cause or restriction. Remember – we are talking about the potential surveillance of law abiding citizens who have committed no offence – and this, in a free and democratic society.

In addition, the database maintained on behalf of the Police infringes upon key Fair Information Practices, which are based on internationally-recognized privacy principles that have been codified in privacy laws around the world, and most recently, have been harmonized into a Global Privacy Standard developed by a committee of international privacy commissioners, chaired by my office.

Among the Global Privacy Standard principles breached by the creation of this database are that of data-minimization (*i.e.*, that personally identifiable information collected by organizations should be kept to an absolute minimum), use limitation (*i.e.*, that personal information should not be used for secondary purposes, accessible to third parties), and openness (*i.e.*, that organizations should be transparent in terms of the scope of personal information they collect).

In *Cash Converters*, the Court of Appeal ruled that by-laws enacted by the City of Oshawa requiring the collection and provision of records to the police were in conflict with the *Act* and were therefore, “of no effect.” In dealing with this complaint, I am taking a similar approach with respect to the information practices of the City of Ottawa and the Ottawa Police Service – they should be considered null and void.

I also note that the Court of Appeal in *Cash Converters* stated that municipalities may wish to seek the expertise of my office in regulating second-hand goods entities. My office will soon be publishing a set of guidelines with respect to the regulation of used goods, in an effort to provide assistance in this area to all municipalities and police forces in the province.

This matter cannot be taken lightly. The routine collection of personally identifiable information from those who have committed no offence goes beyond the constitutional compromise that permits intrusive action by the police in the context of criminal law investigations. In the interests of liberty, we must draw the line at the potential surveillance of law abiding citizens by the state and firmly say “no” to any unnecessary intrusions on our privacy.



Ann Cavoukian, Ph.D.
Commissioner

September 11, 2007

Date

